Clemens v. *Clemens*, that the findings upon which a final judgment is based in one suit will be binding in another suit for a different purpose as against one not a party or in privity with a party to the first suit. On the contrary in the Duchess of Kingston's Case the Court expressly held, "that a sentence of the Spiritual Court against a marriage in a suit of jactitation of marriage is *not* conclusive evidence, so as to estop the Counsel of the Crown from proving the marriage in an indictment for polygamy," and among the reasons assigned for this conclusion we find, "first, because the parties are not the same;" and after enumerating various cases in which sentences of the Ecclesiastical Courts had been received as evidence in other suits, the Court said, "but in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence and had acquiesced under it; or claimed under those who were parties and had acquiesced." The celebrated *dicta* also in that case relating to the effect of judgments in general, one of which is quoted in *Keahi* v. *Bishop*, are expressly confined to cases "between the same parties."

But it is argued that whatever the actual decision in *Keahi* v. *Bishop*, it has generally been regarded by this Court as holding that a probate decree of final distribution is conclusive on a question of inheritance; and that the dissenting opinion in that case presents the same objections that are now urged against the effect of such a decree upon the title to the real estate. To what extent the Court or its members have regarded the decision in question in the manner referred to, we cannot say. It is quite likely that that decision has been thus misunderstood to some extent by both bench and bar, but such misunderstanding we believe has never been acted upon by the Court and should not be allowed to outweigh established principles. As to the objections of the dissenting Justice (the present Chief Justice) in that case, the question of non-identity of parties—upon which the present case depends—was not raised and could not have been raised because in that case the parties were the same. The ground of difference between the majority and minority of the Court was the question of the jurisdiction of the probate court to determine a question of relationship or heirship so as to affect the real estate. The majority of the Court may have erred on this point (see 1 Van Fleet, Form. Adj., 28, 29, 67, 74-76) but, assuming that they did not, or, if they did, that we are now bound by the decision, still it does not affect the present case—which depends on the question of parties. Whether the probate court which made the decree now involved had jurisdiction to determine the question of heirship in a proceeding instituted for that purpose, we need not decide. The proceeding was not in fact instituted for that purpose. Sec. 37 of Chap. 57 of the Laws of 1892 which confers upon Circuit Judges jurisdiction among other things "to determine the heirs at law of deceased persons and to decree the distribution of intestate estates" may go to this extent, but, if so, the proceeding should be instituted directly for the purpose. It appears in the present case that the probate court made a decree declaring who the heirs at law of the decedent were as well as distributing the personal estate, but even if it had jurisdiction at that time to entertain such a matter it did not have it in that particular case because there was no petition or notice to that effect. *Kailianu* v. *Lumai*, 8 Haw. 508.

It is true that under our statutes the same persons are distributees of personal estate and heirs of real estate and that therefore claimants of the real estate might in the capacity of claimants of the personal estate appear in the probate court and contest the same question of descent or pedigree. But they are not obliged to do so. As shown above they may make default and thereby waive all rights to the estate which is made the subject of the suit—the personal estate—and be bound as to that estate upon all questions involved, and yet not thereby waive their right to the estate which is not made the subject of the suit—the real estate. Parties who sue cannot claim more than they ask. See on the subject of identity of statutes, *Morin* v. *St. P., M. & M. Ry. Co.*, 33 Minn. 179.

In the second plea—that of a sale in partition proceedings—the defendant seeks to charge the plaintiff with an estoppel, not an estoppel of record on the ground that his grantors were parties to the partition proceedings or had constructive notice thereof by publication, but an estoppel *in pais* on the ground that they "stood by" with knowledge of the facts. But since the plaintiff in his replication denies that his grantors had such knowledge, it is admitted that the demurrer thereto cannot be sustained, in other words, that the second plea is unavailable at this stage of the case.

Under the third plea it is contended that a conveyance by a disseisee to a third party is void as to the disseisor by "the common law of England," which, "as ascertained by English and American decisions," is, by Sec. 5, Ch. LVII, Laws of 1892, "declared to be the common law of the Hawaiian Islands in all cases except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws."

It is as at least questionable whether such is the common law "as ascertained by English and American decisions," notwithstanding the statements of many standard authors to the contrary.

As for English decisions we know of none upon this subject prior to the Pretended Title Act, 32 Hen. VIII. c. 9. All subsequent decisions have been based upon that Act. The chief ground for supposing this to have been the common law previously is a remark in *Partridge* v. *Strange*, reported in Plowden, that that Act did not alter the common law except as to the penalty. But there had previously, from the time of Edward I., been many statutes passed upon the subjects of champerty and maintenance, and it is impossible to say how much the earlier decisions were affected by those statutes. We are at least without any definite knowledge of the law upon this subject as an intelligible system established by judicial decisions prior to the Pretended Title Act. The principal object in the enactment of those statutes seems to have been to prevent powerful lords from purchasing pretended titles for the purpose of harassing each other and more particularly for the purpose of oppressing and taking advantage of the common people by the exercise of the unfair influence of their wealth and position upon a weak or corrupt judiciary. But as the occasion for those statutes passed away with the changing conditions under which purchases came to be made more for purposes of trade and commerce than oppression, the Courts grew less and less inclined to favor the rule and adhered to it only so far as obliged to do so by statute, and finally the statute itself was repealed in so far as it bears upon the present case. *Jenkins* v. *Jones*, L. R. 9 Q. B. D. 128.

Turning now to America, we find this subject covered by local statute in many states in the majority of which conveyances are expressly permitted notwithstanding adverse possession. Stimson, Am. St. Law, Sec. 1401. In the majority of the other states in which the question has arisen, the judicial decisions are the same way. Among the courts generally referred to and which are referred to by defendant's counsel in this case as holding such conveyances void by the common law are those of Massachusetts and New York. But in the former state the court appears to have so held not so much by the common law of England as by the common law of Massachusetts which included the statute law of England at the time of the "Pretended Title Act." *Somes* v. *Skinner*, 3 Pick. 52; *Brinley* v. *Whiting*, 5 Pick. 348; *Barry* v. *Adams*, 3 Allen 494. And in New York we find the decisions based upon a local statute passed, as the court said, "at an early day" out of "deference for English legislation." This statute was afterwards for the most part abrogated. And the court said that "in this country, and especially in this state, the whole law of maintenance, except so far as it is embodied in our statutes has been repeatedly regarded by the courts as inapplicable to the present condition of society, and substantially obsolete," and that "even in England, the law of maintenance has fallen in a measure, into desuetude." *Sedgwick* v. *Stanton*, 14 N. Y. 289. Maine is another state in which the old rule was deemed law but only, as the court said, because it "was recognized by the Supreme Court of Massachusetts before the separation of this State from that Commonwealth." The old law was however altered by statute and in reply to the argument of counsel for a strict construction of the statute the court after showing the inapplicability of the old law to the present state of social equality, freedom of trade and fair administration of justice, said that it would not "thwart the purposes of beneficent legislation, by substituting therefor doctrines which had their origin in a semi-barbarous age, and which have long since fallen into disrepute with the occasion which elicited them." *Hovey* v. *Hobson*, 51 Me. 62. Some Courts, it is true, adhere to the old rule more distinctly on the ground that it is the common law of England. *Fite* v. *Doe*, 1 Blf. 127; *Martin* v. *Clark*, 8 R. I. 389; *Gruber* v. *Baker*, 20 Nev. 453. But the weight of authority seems to be to the effect that, if this ever were the common law, it is now obsolete as such and has no existence at the present time apart from statute. *Schomp* v. *Schenck*, 40 N. J. L. 195; *Mathewson* v. *Fitch*, 22 Cal. 86; *Bentinck* v. *Franklin*, 38 Tex. 458; *Wright* v. *Meek*, 3 Gr. (Ia) 472; *Hall* v. *Ashby*, 9 Oh. 96; *Brown* v. *Bigne*, 21 Or. 260; *Richardson* v. *Rowland*, 40 Conn. 565; *Roberts* v. *Cooper*, 20 How. (U. S.) 467; *Crane* v. *Reeder*, 21 Mich. 25; *Hadduck* v. *Wilmarth*, 5 N. H. 181.

We are further of the opinion that the doctrine contended for, if common law, is within the exception of the statute, "as otherwise fixed by Hawaiian judicial precedent, or established by Hawaiian national usage." See *Danforth* v. *Streeter*, 28 Vt. 496. The principal grounds upon which the rule is said to rest are champerty, necessity for livery of seisin, and inalienability of a chose in action. Champerty is not a criminal offense here as it was by the common law or early English statutes. The rule is not adapted to the conditions of equality, freedom of trade and fair administration of justice that have long prevailed here. The common law as such was not in force here until January 1, 1893. Livery of seisin has never been required here. *Kapaukea* v. *Lawrence*, 4 Haw. 674; *Rose* v. *Smith*, 5 Haw. 377; *Keamalu* v. *Luhau*, 7 Haw. 324. The ground of non-assignability of a chose in action as a support to this rule was disposed of in *Estate of Kealiiahonui*, 9 Haw. 6. Conveyances by disseisees have frequently been the basis of litigation here without their validity being questioned. See, for instances, *Aylett* v. *Keaweamahi*, 8 Haw. 320; *Kela* v. *Pahuilima*, 5 Haw. 525; *Rose* v. *Smith*, Ib. 377; *Achi* v. *Kawea*, Ib. 298. In the two cases in which alone, so far as we know, the validity of such conveyances has been questioned the conveyances have been sustained, although in one of the cases, *Kapaukea* v. *Lawrence*, 4 Haw. 674, no reasons are given and in the other case, *Estate of Kealiiahonui*, 9 Haw. 6, the reasoning bears only upon the question of non-assignability of a chose in action. See also *Henrique* v. *Paris*, 10 Haw. —.

We are therefore of the opinion that the demurrer and pleas are insufficient and the case is remanded to the Circuit Court of the First Circuit for such further proceedings as may be proper.

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